
IN THE
COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

BRANDON L. DUGGER,
Appellant.

APPELLANT’S BRIEF

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I. INTRODUCTION/SUMMARY OF THE ARGUMENT

The defendant-appellant in this case, Brandon L. Dugger, was twenty-one years old at the time of the incident resulting in his conviction for second degree rape of a fourteen-year-old girl. With one prior felony possession of methamphetamine, which was pending dismissal, Mr. Dugger was sentenced to a minimum 25-year sentence and a maximum sentence of life under RCW 9.94A.507(1)(c)(ii). The term of community custody was also for life.

On appeal, Mr. Dugger argues the prosecutor's characterization of his defense as "insulting" was improper and prejudicial. A new trial is required when the remark could easily have served as the deciding factor in what was largely a credibility contest between Mr. Dugger and the girl as to whether the sexual intercourse was consensual.

If the Court upholds his conviction, the conditions related to Mr. Dugger's contact with minors, one which categorically bans any type of contact for life, another which requires such contact be both

supervised by an adult and with the minor's parents' knowledge, should be stricken. Because these conditions encroach on fundamental constitutional rights, this Court should remand for more narrowly-drafted conditions that are both "reasonably necessary to accomplish the essential needs of the State and public order" and "sensitively imposed."

Finally, the condition related to a cell phone with photo storage capacity should be stricken because it was not statutorily authorized.

II. ASSIGNMENT OF ERROR

A. Assignment of Error

1. The superior court erred in denying Mr. Dugger's request for a mistrial in the face of the State's improper, prejudicial comment during closing arguments.

2. The trial court violated Mr. Dugger's constitutional rights in imposing a condition of community custody categorically prohibiting him from contact "with juveniles under 18 years of age" for the rest of his life.

3. The trial court violated Mr. Dugger's constitutional rights in imposing a condition of community custody allowing contact with minors "under supervision of an adult who is aware of the conviction and the conditions of supervision and approved by the Community Corrections Officer. The parents of any juveniles must also be aware of this conviction."

4. The trial court exceeded its statutory authority in imposing a condition of community custody that Mr. Dugger not "possess, use, or have access to any cellular phone with photo storage capability."

B. Issues Pertaining to Assignment of Error

1. Immediately following defense counsel's closing argument suggesting the sexual contact between Mr. Dugger and the girl was consensual, the prosecutor stood up and said, "It's insulting. It's insulting for someone to stand here and make Mr. Dugger -".

When the evidence was largely a credibility contest between Mr. Dugger and girl regarding whether the contact was consensual or forced, was this comment

improper and prejudicial such that reversal is required?

2. If the Court affirms Mr. Dugger's conviction, did the trial court violate Mr. Dugger's constitutional rights of speech, association and movement when it imposed conditions of community custody regarding his interaction with minors that were neither "reasonably necessary to accomplish the essential needs of the State and public order" nor "sensitively imposed"?

3. Did the trial court exceed its statutory authority in prohibiting possession, use or access to a cell phone with photo storage capacity when such a condition was neither crime-related nor necessary for the safety of the community?

III. STATEMENT OF THE CASE

A. Procedural History

By information filed November 30, 2010, the State charged Mr. Dugger with Rape in the Second Degree in violation of RCW 9A.44.050(1)(a) and Rape of a Child in the Third Degree in violation of RCW 9A.44.079. Both crimes were alleged to have been committed on November

28, 2010, against S.M.H. Clerk's Papers (CP) 1-3. An amended information was filed March 25, 2011, without objection, alleging with regard to the Rape in the Second Degree the victim was less than fifteen years old at the time of the crime and indicating Mr. Dugger would be subject to sentencing pursuant to RCW 9.94A.507(1)(c)(ii). CP 6 & 7-8.

A CrR 3.5 hearing was held; Mr. Dugger agreed he had made a valid waiver of his Miranda rights. Verbatim Report of Proceedings for March 25, 2011 at 40; CP 9-11.

Mr. Dugger was convicted of both counts after a jury trial, the Honorable David Edwards presiding. Verbatim Report of Proceedings for September 20 & 21, 2011 (TRP); CP 25 & 27. The jury further found S.M.H. was under fifteen years of age on the date of the crime. CP 26.

At sentencing, Mr. Dugger's conviction for Rape of a Child in the Third Degree was dismissed without prejudice. CP 37; Verbatim Report of Proceedings for 11/7/11 (VRP) at 329 & 333. With one prior felony

conviction for possession of methamphetamine, which was pending dismissal, CP 30, Mr. Dugger faced a mandatory minimum 25-year sentence and a maximum sentence of life under RCW 9.94A.507(1)(c)(ii). VRP for 11/7/11 at 328-30. The court imposed sentence accordingly. VRP for 11/7/11 at 330; CP 41. The term of community custody imposed was "any period of time the defendant is released from total confinement before the expiration of the statutory maximum." CP 42. In this case, Mr. Dugger must serve community custody from the time of his release from prison to the end of his life, as life is the statutory maximum sentence.

The Judgment and Sentence (J&S) imposed, *inter alia*, the following condition of community custody, without objection: Mr. Dugger shall "[h]ave no contact with juveniles under 18 years of age." CP 42 & 45. It also required that Mr. Dugger comply with any other recommendations made by the Department of Corrections (DOC) in the Presentence Report/Investigation (PSR). CP 43.

The PSR contains its own, somewhat conflicting, prohibition regarding contact with juveniles. That documents specified Mr. Dugger "[s]hall have no contact with juveniles under the age of 18 unless under supervision of an adult who is aware of the conviction and the conditions of supervision and approved by the Community Corrections Officer. The parents of any juveniles must also be aware of this conviction." CP 36. The PSR also does not allow Mr. Dugger to "possess, use, or have access to any cellular phone with photo storage capability." CP 36.

Mr. Dugger filed a timely notice of appeal on November 7, 2011, amended November 14, 2011. CP 38 & 51.

B. Substantive Facts

1. Facts Related to the Charged Offenses.

S.M.H., born on October 2, 1996, TRP 57, was spending time with friends on November 27, 2010. She and her friends, including D.T., A.Y. and A.C., were all at A.C.'s house near Aberdeen high school. TRP 58. The group walked to the mall, other stores and parks

together until heading to Swanson's to meet Mr. Dugger. Mr. Dugger was going to supply them with some marijuana. TRP 59-60 & 117. S.M.H. had seen Mr. Dugger before. TRP 61, 107 & 117.

When Mr. Dugger arrived, the group, now including Mr. Dugger, walked to Finch Park. TRP 61. After a brief time there, they headed to an apartment building near the high school to get the marijuana from a friend of Mr. Dugger's. TRP 62. On the way to the apartments, the group stopped at Sam Benn Park to smoke some hash; S.M.H. had a couple puffs. TRP 66; *cf.* TRP 88 (the group smoked hash by the old hospital for about 20 minutes); TRP 106.

The apartments had a long flight of stairs on the outside of the building. TRP 62-63. The entire group went upstairs to an apartment on the top floor, but no one answered their knock. Mr. Dugger suggested they enter the apartment through a window. TRP 63, 110 & 119. S.M.H.'s friends suggested S.M.H. should go through the window since she was the smallest. TRP 63-

64; cf. 110 & 119 (A.Y. and A.C. testified it was Mr. Dugger who suggested S.M.H. should try the window).

S.M.H. and Mr. Dugger walked back down the stairs and tried a window, but it was locked. Then Mr. Dugger told S.M.H. he got a text message indicating they should meet her friends at the high school. TRP 64. D.T. had a cell phone. TRP 65. Accordingly, S.M.H. and Mr. Dugger went to a garage across the street from the high school to wait for her friends. TRP 64.

Still hoping to meet with her friends, S.M.H. returned to Sam Benn Park with Mr. Dugger to wait there. Mr. Dugger was on his phone while they waited. TRP 67. Then Mr. Dugger told S.M.H. they needed to go to a house to meet D.T., A.Y. and A.C. TRP 68. They entered the garage of the house, where S.M.H. told Mr. Dugger to text her friends and tell them she was going to B.'s house if they did not text back in five minutes. TRP 68-69.

When S.M.H. tired of waiting and decided to leave, Mr. Dugger wrapped a cord from his cell phone charger around her neck. TRP 69. The cord pulled S.M.H. down.

She tried to yell, but Mr. Dugger said not to yell because he had a knife, showing her the knife. He told her they were leaving and they returned to Sam Benn Park. S.M.H. was not restrained at this point. TRP 70.

Mr. Dugger then took S.M.H. toward a big ditch, where they sat on the ground. He told her she would have three strikes and then something was going to happen. He took off her shoe, put her sock in her mouth and tied her hands behind her back with the cord. TRP 71-72. He then put shoes back on, took the sock out of her mouth, and they started walking up the hill with her hands still tied. When S.M.H. said something, Mr. Dugger said, "that's a strike." TRP 72. As they approached a guardrail, S.M.H. said something else, to which Mr. Dugger replied, "that's two strikes." TRP 72. On the hill walking towards the guardrail, Mr. Dugger untied her hands. TRP 76. At the guardrail, S.M.H. spoke again and Mr. Dugger said it was "three strikes." TRP 72-73.

The two climbed over the guardrail and went down a steep, rocky ravine. TRP 73-74, 126-27 & 175-76. They

sat down and Mr. Dugger told S.M.H. to take her clothes off. He began kissing her and demanded she perform oral sex on him. TRP 74. She complied. He then returned the sock to her mouth, bent her over the rock, pulled out her tampon (she was having her period), and put his penis in her anus. TRP 75-76.

S.M.H. complied with Dugger's directions because she was afraid if she did not do as she was told, she would not be able to go home and he would hurt her. TRP 103. S.M.H. could not remember some details of the assault, such as whether her hands were tied at the time of the oral sex, when her clothes were removed, and whether Mr. Dugger used a condom. TRP 92-95 & 99-100.

The rape lasted about 10 minutes. Afterwards, S.M.H. put her clothes back on, Mr. Dugger apologized, and the two returned to Sam Benn Park, where they separated. TRP 77. S.M.H. went to the bus station to find a phone to call 911. TRP 78. A police officer arrived and transported her to a hospital, where she was questioned and examined. TRP 78-79 & 168. She

appeared to have been crying and had a small red mark near the base of her neck and red cheeks. TRP 168-69. It was a chilly night. TRP 171.

A.Y. and A.C. were part of the group of friends with S.M.H. much of the day, hanging out and looking for someone to buy marijuana for them. TRP 105 & 116-17. Their testimony was consistent with that of S.M.H. See TRP 104-15 & 116-24. After S.M.H. and Mr. Dugger went down the apartment staircase, the friends waited outside the apartment door for a while. TRP 111 & 119. S.M.H. and Mr. Dugger did not return. However, the group received texts from Mr. Dugger directing them to meet him and S.M.H. at various places, until finally Mr. Dugger told them S.M.H. had gone over to B.'s residence. The friends did not meet up with S.M.H. again that night. TRP 111-12 & 119-20.

S.M.H.'s friends met up with Mr. Dugger late, either 11:00 p.m., TRP 112, or two or three in the morning, at a 7-Eleven. TRP 121. He still had their money with which he was going to purchase marijuana; when they asked for it, he asked to borrow D.T.'s cell

phone and left. TRP 113; *cf.* TRP 121 (A.C. said she gave Mr. Dugger ten dollars before he left with the phone). Mr. Dugger did not return, but the friends found him. He related he had been robbed of the money and the phone. TRP 113 & 121-23.

The Aberdeen police department recovered a cell-phone charging cord from the brush in the location of the incident, TRP 127, footprints, S.M.H.'s green and black sock, a used condom, a condom wrapper, a discarded tampon, TRP 178, a knife, and a bracelet. TRP 189-90 & 205. In addition, the DNA profile of semen taken from anal swabs of S.M.H. matched Mr. Dugger's DNA profile. TRP 255.

A sexual assault nurse met with S.M.H. around 7:15 the morning of November 28, 2010. TRP 227. S.M.H. was clean, except for her feet, calm and cooperative. Her main concerns were that Mr. Dugger knew where she lived or had AIDS. TRP 230, 233.

S.M.H. said the assault happened outdoors, around two in the morning. TRP 231. In terms of threats and force used, S.M.H. told the nurse when she tried to

leave, Mr. Dugger wrapped his charger cord around her neck and that he tied her hands with the cord. TRP 231. When she told Mr. Dugger she was on her period, "he said I was going to have to take it in the butt." TRP 233 & 75. S.M.H. also told the nurse Mr. Dugger threatened that she would not see her mother again if she resisted and that he would stab her if she screamed. S.M.H. told the nurse she had had no prior sexual intercourse. TRP 233. The history S.M.H. gave the nurse was generally consistent with her testimony. See TRP 233-36.

The nurse testified it is common for people to forget memories of an assault and that S.M.H. had a partial recollection of the events. TRP 235. S.M.H. was not experiencing any pain, difficulty breathing, or other physical abnormalities. TRP 237-38. The nurse detected linear lacerations in the anal folds of S.M.H., indicating blunt force trauma, and faint marks like ligature marks around her wrist and neck. TRP 238-39. She took a photograph of S.M.H.'s left cheek, which S.M.H. told her had been slapped. TRP 239.

When Mr. Dugger was arrested, he told the arresting officer, "I didn't rape anybody. I would never do that." TRP 199. He then said something to the effect of: "All I know is when I woke up this morning my cell phone was full of text messages telling me the cops wanted me for some sort of rape." TRP 201-02. At the station, an officer saw blood on Mr. Dugger's underwear but no injury. TRP 200.

Detective Sergeant John Laur interviewed Mr. Dugger at the police station on November 29, 2010. Mr. Dugger told him he was routinely assaulted by his father since the age of ten, and that he believed his father had molested him and his sister when they were younger. TRP 139. Mr. Dugger does not read or write well. TRP 145.

Regarding the crime, Mr. Dugger said he was wearing his father's coat as he and S.M.H. walked up the hill, and that it was in his father's coat pocket that he found a pocket knife. He grabbed it, held it out, and told S.M.H. to be quiet. TRP 141. The phone cord was left behind by one of S.M.H.'s friends; Mr.

Dugger demonstrated how he had wrapped S.M.H.'s wrists with the cord. TRP 142. Once he and S.M.H. got to the bottom of the ravine, he forced her to have sex with him, first oral sex, then intercourse. Mr. Dugger said he stopped when he realized he was acting like his father. TRP 143. He apologized to S.M.H. and gave her his coat. TRP 144.

At trial, Mr. Dugger testified S.M.H. initiated consensual oral sex and anal intercourse with him. TRP 267-69. He denied forcing S.M.H. to do anything. TRP 271-72.

2. The State's Comment in Closing Argument

In closing argument, Mr. Dugger's counsel maintained that the contact between Dugger and S.M.H. was consensual. To that end, counsel argued S.M.H. should not be believed due to various inconsistencies in her testimony. TRP 294-312. His final statement was:

Convict Mr. Dugger of what he did, rape of a child in the third degree. Send him to prison for that, not over the word of a high 14-year-old lost in the middle of the night that feeds you a story.

TRP 312.

The prosecutor stood up for rebuttal argument and stated, "It's insulting. It's insulting for someone to stand here and make Mr. Dugger --" TRP 312. Mr. Dugger objected and moved for a mistrial, arguing the remarks were disparaging and demeaning to defense counsel. TRP 312-13. The trial court denied the motion. TRP 314.

IV. ARGUMENT

POINT I: Improper Prosecutorial Comment Deprived Mr. Dugger of His Right to a Fair Trial

Mr. Dugger was deprived of his right to a fair trial by the prosecutor's misconduct in this case. Defendants are guaranteed the right to a fair and impartial trial by the Sixth and Fourteenth Amendments of the United State's Constitution, and by article I, section 3 and article I, section 22 (amendment 10) of the Washington Constitution. In re Crace, 157 Wn. App. 81, 96, 236 P.3d 914 (2010) *quoting* State v. Finch, 137 Wn.2d 792, 844, 975 P.2d 967 (1999). "Prosecutorial misconduct may deprive a defendant of his right to a fair trial." State v. Evans, 163 Wn. App. 635, 642, 260 P.3d 934 (2011); *citing*, State v. Jones, 144 Wn. App. 284, 290, 183 P.3d 307 (2008).

A prosecuting attorney, a quasijudicial officer, must act with impartiality in the interest of justice and "subdue courtroom zeal for the sake of fairness to the defendant." State v. Thorgerson, 172 Wn.2d 438, 448, 258 P.3d 43 (2011) (citations omitted). While "the prosecuting attorney has wide latitude to argue reasonable inferences from the evidence" in closing arguments, Thorgerson, 172 Wn.2d 438, 443, the prosecutor also owes the defendant a duty to ensure the right to a fair trial is not violated. State v. Ramos, 164 Wn. App. 327, 333, 263 P.3d 1268 (2011), *citing*, State v. Monday, 171 Wn.2d 667, 676, 297 P.3d 551 (2011).

To prevail on appeal, Mr. Dugger must show "that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial." Thorgerson, 172 Wn.2d 438, 442 (citations omitted). "Remarks of the prosecutor, even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless

the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective." State v. Russell, 125 W.2d 24, 86, 882 P.2d 747 (1994).

Conduct is prejudicial if the Court finds "a substantial likelihood the misconduct affected the jury's verdict." State v. Stenson, 132 Wn.2d 668, 718-19, 940 P.2d 1239 (1997). This Court reviews prosecutors' comments "in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions." Evans, 163 Wn. App. 635, 642, *citing*, State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). When the trial court overruled a defense objection, the trial court's ruling is reviewed for abuse of discretion. State v. Ish, 170 Wn.2d 189, 195, 241 P.3d 389 (2010) (citations omitted).

In this case, the prosecutor's comment was both improper and prejudicial as it impugned the integrity of defense counsel and belittled the defense. In Thorgerson, the Supreme Court held improper the

prosecutor's presentation of the defense case as "bogus," involving "sleight of hand" and "desperation" as it impugned defense counsel's integrity and "went beyond the bounds of acceptable behavior." Thorgerson, 172 Wn.2d 438, 451-52. Nevertheless, the Court found no reversible error because the comments were not objected to and a curative instruction would have remedied the prejudice. *Id.* at 452.

Here, the State's rhetoric was even more inflammatory than that used in Thorgerson. In this case, the prosecutor called the defense's argument—which was only to challenge the credibility of the State's primary witness—"insulting." That comment was an explicit denigration of defense counsel and his argument and an implicit profession of the State's opinion of Mr. Dugger's guilt. In other words, the comment was both "unethical and prejudicial." State v. Traweek, 43 Wn. App. 99, 107, 715 P.2d 1148 (1986). Accordingly, the comment was improper.

Further, the comment prejudiced Mr. Dugger. First, in contrast to Thorgerson, Mr. Dugger objected to the

comment immediately and sought a mistrial. Thus, the standard for reversal is lower than in Thorgerson.¹ In addition, the comment created "a substantial likelihood the misconduct affected the jury's verdict" when the evidence was essential a "credibility contest" between Mr. Dugger and S.M.H. and was not so strong that a conviction would clearly have been obtained without the improper remark.

In State v. Walker, the Court noted that in cases where a conviction is reversed for prosecutorial error, the evidence has generally been a "credibility contest." 164 Wn. App. 724, 737-38, 265 P.3d 191 (2011), *discussing*, State v. Johnson, 158 Wn. App. 677, 243 P.3d 936 (2010); State v. Venegas, 155 Wn. App. 507, 228 P.3d 813 (2010). Walker reversed the defendant's conviction due to several unobjected-to errors when the evidence against the defendant "was largely a credibility contest in which the prosecutor's

1. Misconduct that was not objected to below is considered waived on appeal "unless the misconduct is so flagrant and ill-intentioned that it evinces an enduring prejudice the trial court could not have cured by an instruction." Evans, 163 Wn. App. 635, 642-43.

improper arguments could easily serve as the deciding factor." Walker, 164 Wn. App. at 738.

Here, similarly, the evidence was a credibility contest with the main issue-whether the sex was consensual or forced-in dispute. Under these circumstances, and as was held in Walker, Johnson and Venegas, the prosecutor's comment could easily have been the deciding factor, denying Mr. Dugger his right to a fair trial and requiring reversal.

For all these reasons, the prosecutor's comment was both improper and prejudicial and this Court should reverse Mr. Dugger's conviction.

Point II: The Community Custody Provisions Prohibiting All Contact with Minors For Life and Limiting Such Contact to Restricted Situations Improperly Infringe on Mr. Dugger's Constitutional Rights of Free Speech, Association and Movement, Requiring Remanded

The challenged sentencing conditions regarding contact with minors impermissibly infringe on Mr. Dugger's constitutional rights because they were neither "reasonably necessary to accomplish the essential needs of the State and public order" nor "sensitively imposed." The conditions affect

fundamental federal and State constitutional rights of free speech and association. See State v. Riles 135 Wn.2d 326, 346, 957 P.2d 655 (1998); U.S. Const. amend. I, V & XIV; Wash. Const. art. 1, §§ 3 & 5. They also implicate Mr. Dugger's First Amendment rights to move about freely. See Riles 135 Wn.2d at 347, citing, City of Tacoma v. Luvane, 118 Wn.2d 826, 839, 827 P.2d 1374 (1992) (noting, "the right to walk, stroll, or wander aimlessly is a liberty 'within the sensitive First Amendment area' that is protected by the Fourteenth Amendment") (citation omitted).^{2,3}

An appellate court generally reviews the imposition of crime-related sentencing prohibitions for

2. This challenge is ripe for review. State v. Valencia, 169 Wn. 2d 782, 239 P.3d 1059 (2010) (holding pre-enforcement challenge to condition of community custody ripe for review "if the issues raised are primarily legal, do not require further factual development, and the challenged action is final").

3. Both conditions also potentially infringe on Mr. Dugger's fundamental right to parent, although this issue is likely not ripe for review since Mr. Dugger is not currently a parent. Parents have a fundamental liberty interest in the care, custody, and control of their children. State v. Ancira, 107 Wn. App. 650, 653, 27 P.3d 1246 (2001), citing, Santosky v. Kramer, 455 U.S. 745, 753, 102 S. Ct. 1398, 71 L. Ed. 2d 599 (1982) (in determining the standard of proof necessary in termination of parental rights case, the Court noted its "historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment").

abuse of discretion. State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008), *citing*, State v. Riley, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993) (upholding computer-related sentencing conditions). However, more careful review of such conditions is required when those conditions interfere with fundamental rights. Warren, 165 Wn.2d 17, 32, *citing*, Riles 135 Wn.2d 326, 347. Sentencing conditions which interfere with fundamental rights must be 1) "reasonably necessary to accomplish the essential needs of the State and public order" and 2) "sensitively imposed." Warren, 165 Wn.2d 17, 32, *citing*, Riley, 121 Wn.2d at 37; *see also* State v. Sims, 152 Wn. App. 526, 531-32, 216 P.3d 470 (2010) (applying strict scrutiny to sentencing condition that banished defendant from county, since such order encroached on constitutional right to travel, and holding such orders must be "narrowly tailored"), *aff'd*, 171 Wn.2d 436, 256 P.3d 285 (2011).⁴

4. The challenged conditions imposed in Mr. Dugger's J&S categorically prohibit "contact with juveniles under 18 years of age." CP 42 & 45. The challenged condition in the PSR prohibits contact with minors unless "under supervision of an adult who is aware of the conviction and the conditions of supervision and approved by the Community Corrections Officer. The parents of any juveniles must also be aware of this conviction." CP 36.

In this case, the trial court was authorized to impose the condition that an offender "[r]efrain from direct or indirect contact with the victim of the crime or a specified class of individuals." RCW 9.9A.703(3)(b). Moreover, prevention of harm to children is a compelling state interest. State v. Ancira, 107 Wn. App. 650, 654, 27 P.3d 1246 (2001). However, any conditions which serve State interests but also infringe on protected rights must be both "reasonably necessary to accomplish the essential needs of the State and public order," and "sensitively imposed." Warren, 165 Wn.2d 17, 32 (upholding condition prohibiting contact with spouse for life).

Courts of appeal have struck sentencing conditions that infringe on a defendant's constitutional rights when they were not reasonably necessary to accomplish the State's goals. In Ancira, for example, the court struck a no-contact order prohibiting the defendant from any direct or indirect contact with his children. The Court held the children could be protected by allowing the defendant to have indirect contact by

phone or mail, or supervised visitation outside the presence of their mother (who was the victim of the domestic violence at issue). Thus, it was not reasonably necessary to cut off all contact with the children. Ancira, 107 Wn. App. 650, 655. Similarly, in State v. Letourneau, the court struck a condition prohibiting the defendant/mother from having contact with her children when such condition was not "reasonably necessary to protect those children from the harm of sexual molestation by their mother." 100 Wn. App. 424, 441, 997 P.2d 436 (2000)

On the other hand, a broad condition barring the defendant from having contact with "any minor-age children" was held constitutional when the defendant had been convicted of anally raping a six-year-old boy. Riles 135 Wn.2d 326, 347. In that case, however, the condition was imposed for only a two-year term of community custody, 135 Wn.2d at 332, not for the duration of the defendant's life. In addition, the defendant was sentenced to only 102 months in prison, meaning the condition would likely be in effect in

about eight years. *Id.* A lifetime ban on contact with minors beginning twenty-five years after its imposition presents a qualitatively different situation not addressed in Riles.

The qualitative difference between lifetime and more limited conditions was noted in In re Rainey, 168 Wn.2d 367, 381, 229 P.3d 686 (2010). There the Court observed that a lifetime ban on contact with a child could be "draconian":

The duration and scope of a no-contact order are interrelated: a no-contact order imposed for a month or a year is far less draconian than one imposed for several years or life. Also, what is reasonably necessary to protect the State's interests may change over time. Therefore, the command that restrictions on fundamental rights be sensitively imposed is not satisfied merely because, at some point and for some duration, the restriction is reasonably necessary to serve the State's interests. The restriction's length must also be reasonably necessary.

Rainey, 168 Wn.2d 367, 381. Rainey involved a father subject to a lifelong no-contact order regarding his daughter. The Court upheld the order, but remanded so the trial court could impose a condition that fell within the "reasonably necessary" standard for

conditions that infringe upon constitutional rights.
Id. at 382.

Remand for more sensitively-tailored conditions that are reasonably necessary to serve the State's interests is required in this case as well. Mr. Dugger has been sentenced to a minimum of twenty-five years in prison. The challenged conditions will only become effective upon his release, when he is in his mid- to late-forties. There is no knowing whether the conditions, which infringe on fundamental rights, will be necessary at that time. Conditions which infringe on constitutional rights must be "reasonably necessary to serve the State's interests" when they are in effect. Rainey, 168 Wn.2d at 381 ("[t]he command that restrictions on fundamental rights be sensitively imposed is not satisfied merely because, at some point and for some duration, the restriction is reasonably necessary to serve the State's interests").

Significantly, moreover, the restriction in the J&S is much broader than the one the Court ordered limited in Rainey, because here, Mr. Dugger is barred

from any contact whatsoever with minors, not just with one minor in particular. This condition not only potentially limits his interaction with friends and family members but also prohibits him from frequenting places where minors are likely to be found, such as malls, fast food restaurants, and movie theaters.

While the restriction in the PSR is more narrowly tailored, by its terms it extends to all contact with minors, direct or indirect, purposeful or incidental. Requiring the presence of an adult supervisor and the knowledge of the minors' parents during even indirect or incidental contact will likely be impossible to achieve. Thus, the condition has a similar, impermissibly-restrictive effect on Mr. Dugger's constitutional freedoms as the condition in the J&S, preventing Mr. Dugger from even frequenting places where minors might be found.

For all these reasons, the challenged conditions should be stricken and this Court should remand for the imposition of sensitively-tailored conditions regarding

Mr. Dugger's contact with minors that are reasonably necessary to serve the State's interests.

**POINT III: The Condition Regarding a Cell Phone
with Capacity to Store Photographs Was
Not Authorized by Statute**

The condition regarding Mr. Dugger's access to a cell phone with certain features should be stricken because it was not statutorily authorized. An appellate court reviews de novo whether the trial court had statutory authority to impose a challenged condition of community custody. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

The trial court is required to impose certain mandatory terms of community custody and authorized to impose others. RCW 9.9A.703. One of the mandatory conditions is to require "the offender to comply with any conditions imposed by the department under RCW 9.94A.704." RCW 9.94A.703(1)(b). Under that provision, when a defendant is sentenced pursuant to RCW 9.94A.507, which Mr. Dugger was, DOC is empowered "to recommend to the board any additional or modified conditions based upon the offender's risk to community

safety conditions.” RCW 9.94A.704(9). In addition, the trial court may impose require an offender to “[c]omply with any crime-related prohibitions.” RCW 9.94A.703(2)(f). The challenged condition imposed by DOC in this case must be stricken because it was neither crime-related nor related to community safety conditions.

Courts routinely strike conditions of community custody when they are neither crime-related nor otherwise authorized. For example, a condition prohibiting contact with minors was stricken in State v. Riles when the defendant’s crime did not involve a minor. 135 Wn.2d 326, 349-50, 957 P.2d 655 (1998). In State v. Acevedo, the court held a condition prohibiting a defendant from possessing a deadly weapon was not authorized when the defendant had been convicted of possession of a stolen motor vehicle. 159 Wn. App. 221, 224, 248 P.3d 526 (2010). In State v. O’Cain, the Court found a condition prohibiting unapproved Internet access was not crime-related when the underlying crime was rape and the defendant had not

used the Internet in the commission of the crime. 144 Wn. App. 772, 184 P.3d 1262 (2008).

In this case, similarly, the cell-phone condition was not crime-related, is not related to the safety of the community, and was not otherwise authorized by statute. The condition prohibits possession, use or access to a cell phone with the capacity to store photos. While Mr. Dugger used a cell phone during the crime, it was not to take, store or send photos. Indeed, there were no allegations at trial that Mr. Dugger did anything related to the storage of photos on his cell phone. Accordingly, this prohibition was not authorized by statute and the Court should order it stricken.

V. CONCLUSION

For all of these reasons, Brandon L. Dugger respectfully requests this Court to reverse his conviction or, in the alternative, to remand his case for the imposition of conditions related to contact with minors that are "reasonably necessary to accomplish the essential needs of the State and public

order" and "sensitively imposed" and to strike the condition related to cell phones with photo storage capacity.

Dated this 5th day of June 2012.

Respectfully submitted,

/s/ Carol Elewski
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CERTIFICATE OF SERVICE

I certify that on this 5th day of June, 2012, I caused a true and correct copy of Appellant's Brief to be served, by e-filing, on:

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